D.P. VIJANDRAN

v.

KARPAL SINGH

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-23-3-1990]
27 NOVEMBER 1991

CIVIL PROCEDURE: *Oral application for stay pending appeal before Judge in chambers - Failure to file affidavit of special circumstances in support of application - Whether irregularity - Whether nullity - Procedural rules - Proper administration of justice - Examination of trial records - Filing of defence would be inconsistent with application to set aside service of writ - Discretion of Court - Bona fide of plaintiff - Rules of the High Court 1980, O. 2 r. 1(1), O. 10 r. 3(1), O. 92 r. 4.*

The plaintiff instituted an action against the defendant claiming damages in respect of certain defamatory statements of the plaintiff made and published by the defendant in three daily newspapers.

The defendant sought and obtained leave to enter conditional appearance and subsequently applied by summons-in-chambers supported by an affidavit to set aside the service of the writ and statement of claim which he contends was not served on him in accordance with the Rules of the High Court 1980.

While this application was pending, the plaintiff re-served the writ and statement of claim which the defendant accepted under protest. The defendant again sought and obtained leave to enter conditional appearance and subsequently filed a second application by way of summons-in-chambers supported by an affidavit to set aside the second service. The first application was heard before the Senior Assistant Registrar (SAR) and a decision was delivered on 11 October 1991 dismissing the defendant's application.

The learned SAR also refused an oral application for stay of proceedings pending an intended appeal to the Judge in chambers and instead ordered the defendant to file his defence by 25 October 1991.

The defendant filed an appeal which was set down for hearing on 27 January 1992. The matter came for mention before the Judge on 24 October 1991 pursuant to a certificate of urgency filed by the defendant contending that his appeal, if successful would be made redundant if a stay was not granted. The Judge thereupon ruled that he was obliged to hear the defendant's oral application for stay the very next day.

The plaintiff raised 3 objections to the defendant's application for stay *viz:*

(a) No proper application was made before the SAR for a stay of proceedings;

(b) there was no rule which allowed an oral application for summons in chambers; with the exception of O. 35 r. 7 applications and

(c) the defendant's application for stay was unsupported by an affidavit of special circumstances.

Held:

[1] Although it has been stated that procedural rules of the Court should be obeyed, mere technicalities should not have such overriding effect as to place an impediment to the proper administration of justice. (see O. 92 r. 4 and O. 2 r. 1 of RHC 1980).

[2] The failure on the part of the defendant to follow strictly to the procedural rules in making his oral application to stay the proceeding pending the hearing of his appeal could only be regarded as a mere irregularity which does not render his application a nullity if and only if his omission to abide strictly to the procedural rules would not cause the plaintiff to suffer any prejudice and more importantly if the defendant's application should be entertained in order that justice will be done.

[3] The defendant could not be expected to file his defence for in doing so it would certainly be inconsistent with his applications to set aside the service of the writ - he would surely be accused of having waived his right to do so. Under such circumstances the SAR should have allowed the defendant's application albeit made orally for a stay of the proceeding to obviate the necessity for him to file a defence pending his appeal to the Judge in chambers. The plaintiff on the other hand will suffer no prejudice at all since no reason has been advanced as to why the plaintiff should be so eager to compel the defendant to file his defence bearing in mind that the plaintiff only instituted his suit in January 1990 and also because the plaintiff knew that the defendant was trying to set aside the service of the writ.

[4] In objecting to the defendant's application for a stay and insisting that the defendant files his defence before he could even appeal, the plaintiff is trying to prevent the defendant from taking any further steps to set aside the service of the writ when the plaintiff was himself uncertain as to the legality of his service. The Court was justified in questioning the *bona fides* of the plaintiff.

[5] With regard to the allegation that the defendant's application was not supported by an affidavit of special circumstances, the plaintiff knew or ought to have known of the special circumstances relied on by the defendant namely that if a stay was not allowed it would have rendered both the applications to set aside the service of the writ and the appeal totally useless. In any event the Court was not precluded from examining the records of the trial to see whether there were any special circumstances to sustain the application for a stay.

[6] There is no doubt that if the application for stay is not granted and should the defendant succeed in his appeal against the decision of the SAR, the defendant could obtain no restitution as filing his defence would render his application to set aside the writ useless and inoperative. If the defendant had failed to enter a conditional appearance, this would have amounted to a waiver to object against the irregularity of the service of the writ on him under O. 10 r. 3(1) of the RHC 1980.

[7] The defendant had sufficiently established that there were special circumstances to justify the application for stay.

[Defendant's oral application for a stay allowed with costs.]

Cases referred to:

Annamalai Chettiar v. Yeoh Kee Tin [1956] MLJ 49 ***(cit)***
Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(cit)***
Ratnam v. Cumarasamy [1964] 3 All ER 93 ***(cit)***
Ee Kim Kin v. The Collector of Land Revenue Alor Gajah [1967] 2 MLJ 89 ***(foll)***
Serangoon Garden Estate Ltd. v. Ang Keng [1953] MLJ 116 ***(foll)***
Atkins v. The Great Western Railway Company [1886] 2 TLR 400 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1(1), O. 10 r. 1, O. 25 r. 7, O. 32 r. 1, O. 92 r. 4

Other source referred to:
English Supreme Court Practice, 1988 Edn., Vol. 1, p. 10

For the plaintiff - M.S. Murthi; M/s. Murthi & Partners
For the defendant - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

Lim Beng Choon J:

The plaintiff instituted an action on 9 January 1990 by writ endorsed with a statement of claim in which he alleged that the defendant falsely and maliciously spoke and published to the newspaper reporters of the *New Straits Times*, *The Star* and the *Sunday Mail* certain statements on 11, 12, 13, 14, 23, 24 & 25 December 1989 respectively which are defamatory of the plaintiff and which the defendant published as a part of a vindictive and malicious campaign to discredit the plaintiff and to show that the plaintiff was unfit to hold the offices of Deputy Speaker of Parliament, Secretary General of the Malaysian Indian Congress, Member of Parliament of Kapar, Director of TV3 and/or any public office. The plaintiff therefore claimed for damages for slander and/or libel (including aggravated damages), and an injunction to restrain the defendant whether by himself, his servants or agents or otherwise howsoever from further publishing the said or any similar defamatory words defamatory of the plaintiff and costs.

On 5 February 1990 the defendant applied by way of summons-in-chambers for leave to enter conditional appearance on the ground that the defendant intended to and would be applying to set aside service of the writ on him and for an order declaring that the writ had not been duly served on him in accordance with the Rules of High Court 1980. The application was supported by an affidavit affirmed on 5 February 1990 by a clerk attached to the defendant's law firm in which it was stated *inter alia* that in the ordinary course of his work he had opened the post box at the office of Messrs Karpal Singh & Co. at about 11.30 a.m. on 2 February 1990 and he had found an envelope addressed to Mr. Karpal Singh from Messrs Murthi & Partners, Advocates & solicitors Klang together with AR card annexed thereto lying in the post box. He had taken out the envelope and left it on Mr. Karpal Singh's table. On Mr. Karpal Singh's return to Kuala Lumpur on 5 February 1990 morning he had opened it and had enquired about it.

Apparently the application of the defendant for leave to enter a conditional appearance was allowed and he duly filed in his memorandum of conditional appearance on 6 February 1990. Thereafter on 8 February 1990 the defendant applied again by summons-in-chambers for the following orders:

(1) an order that the purported service of the writ of summons and statement of claim herein on the defendant by AR registered post or post on or about 2 February 1990 be set aside;

(2) an order declaring that the writ has not been duly served on the defendant; and

(3) an order that the plaintiff do bear and pay all costs of an incidental to this application.

The application was supported by an affidavit by the defendant on 8 February 1990. In the affidavit the defendant reiterated what was asserted by his clerk in the latter's affidavit mentioned above. The defendant then asserted that the writ of summons was required to be

personally served on him and not by AR registered post or by post and hence the purported service or service of the writ on him by AR registered post or by post was wrong in law and was contrary to the Rules of High Court 1980.

The hearing of the defendant's application to set aside the service of the writ was postponed a few times as the dates fixed for hearing were found not suitable to either the Counsel for the plaintiff or the defendant who is representing himself. Before a final date was fixed for hearing surprisingly the solicitors for the plaintiff Messrs. Murthi & Partners once again served the writ and statement of claim on the defendant on 11 December 1990. The defendant accepted the writ under protest and without prejudice to his pending application to set aside the service of the writ. As a result of the second service of the writ the defendant again applied for leave to enter conditional appearance which he duly did with leave of the Court and again applied on 27 December 1990 to set aside the second service of the writ and statement of claim of 11 December 1990 on the grounds that the purported service of the said writ on 11 December 1990 was bad in law and of no legal effect in view of the pending application to set aside the earlier purported service of the same writ on 2 February 1990. The defendant further asserted that the law "does not provide for 'double service' or 'multiple service' of a writ".

The defendant's application dated 8 February 1990 to set aside the writ was heard by the Senior Assistant Registrar on 10 October 1991 and she delivered her decision on 11 October 1991 in which she dismissed the defendant's application to set aside the service of the writ and refused to grant the defendant a stay of the proceeding including a stay to file the statement of defence pending his appeal to the Judge in chambers.

The appeal of the defendant to the Judge in chambers was fixed for hearing on 27 January 1992. However on 22 October 1991 the solicitors for the defendant filed in a certificate of urgency requesting for an urgent hearing of the appeal of the defendant on the grounds:

1. defendan diperlukan untuk memfailkan pernyataan pembelaan dalam tempoh 14 hari dari 11 Oktober 1991;
2. sekiranya rayuan ini dibenarkan, soal pemfailan penyataan tidak akan timbul dan sebarang pemfailan penyataan pembelaan akan menjadi sia-sia ('redundant') sahaja; dan
3. rayuan ini mesti didengar sebelum tempoh untuk memfailkan penyataan pembelaan luput.

Upon receipt of this certificate of urgency the SAR fixed the matter for mention before me on 24 October 1991.

When the matter came before me on the 24 October 1991 the defendant applied orally for a stay of the proceeding pending the hearing of his appeal against the decision of the SAR delivered on 11 October 1991. The defendant thereupon suggested that I should hear his application for a stay. Counsel for the respondent, however, objected against the proposal of the defendant stating that the matter was for mention only and the Court should not entertain the defendant's oral application for a stay let alone to hear his submission for a stay. I felt that the argument of Counsel for the plaintiff was quite reasonable as clearly he could not be expected to be ready to submit on the issue. However I was also of the view that as the defendant was directed by the SAR to file his defence on or before 25 October 1991 it is obvious that I should hear the defendant's application the latest by 25 October 1991 that is the last date on which he must, pursuant to the order of the SAR, file his statement of defence. I therefore postponed the hearing of the defendant's application for a stay to 25 October 1991.

At the hearing on 25 October 1991, the defendant submitted that the SAR refused his application for a stay when she heard his applications to set aside the service of the plaintiff's writ. He therefore submitted that if a stay was not granted his appeal to me against the decision of the SAR became redundant. Counsel for the plaintiff on the other hand raised three points in support of his objection against the defendant's application for a stay namely:

(1) there was no proper application made before the SAR for a stay despite leave being granted by SAR to make a proper application. The appellant had therefore side-stepped the Court of the first instance and came before this Court although the SAR was still clothed with jurisdiction and he cited the case of *Annamalai Chettiar v. Yeoh Kee Tin* [1956] MLJ 49 in support of his argument.

(2) pursuant to O. 32 r. 1 of the Rules of High Court 1980 every application in chambers must be made by summons except an application under O. 25 r. 7. There was no rule for oral application.

(3) it was a fundamental rule that there must be an affidavit of special circumstances to support an application for a stay. As there was no affidavit in the instance case to show special circumstances it resulted in the plaintiff's inability to rebut and he cited the case of *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86.

The defendant in reply submitted that the defendant could not file a defence because his application made on 8 February 1990 (encl. 7) and the other application made on 27 December 1990 were to set aside the service of the plaintiff's writ. Furthermore there was an oral application made to the SAR for a stay but the application was refused. In any case it was clearly stated in the notice of appeal to the Judge in chambers that the defendant appealed against the SAR's decision to refuse a stay.

In considering the issue raised in the instant case, it is perhaps appropriate at the outset to state that although it has been stated that procedural rules of the Court should be obeyed (see for instance *Ratnam v. Cumarasamy* [1964] 3 All ER 93) it has also been stated that mere technicalities should not have such overriding effect as to place an impediment to the proper administration of justice and that rules of procedure should be the handmaiden not the master (see: *Ee Kim Kin v. The Collector of Land Revenue Alor Gajah* [1967] 2 MLJ 89). The proposition in *Ee Kim Kin* case finds support in O. 92 r. 4 of the Rules of High Court 1980 which provides:

> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary **to prevent injustice** or to prevent an abuse of the process of the Court.
> (Emphasis supplied)

Further support for the proposition can be found in O. 2 r. 1(1) of the Rules of High Court 1980 which provides:

> 1(1) Where, in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure **shall be treated as an irregularity and shall not nullify the proceedings,** any step taken in the proceedings, or any document, judgment or order therein.
> (Emphasis supplied)

The scope of the said O. 2 r. 1(1) is described in the *English Supreme Court Practice* 1988 Edn., Vol. 1 at p. 10 thus:

> In most cases the way in which the Court exercises its power under O. 2 r. 1(2) is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the irregularity but the rule is so framed as **to give the Court the widest possible power to do justice.**
> (Emphasis supplied)

Following the observation made in the *Ee Kim Kin* case reproduced above and in view of the discretionary powers conferred on this Court by O. 92 r. 4 and O. 2 r. 1(1) of the Rules of the High Court 1980, I am of the view that the failure on the part of the defendant to follow strictly to the procedural rules in making his oral application to stay the proceeding pending the hearing of his appeal to me could only be regarded as a mere irregularity which does not render his application a nullity if and only if his omission to abide strictly to the procedural rules would not cause the plaintiff to suffer any prejudice and more importantly if the defendant's application should be entertained in order that justice will be done.

Let us now examine the facts and circumstances of the instant case. First of all it is important to note that in entering a conditional appearance and making the two applications to set aside the writ and statement of claim of the plaintiff, it is obvious that the defendant could not be expected to file his defence for in doing so it would certainly be inconsistent with his applications to set aside the service of the writ - he would surely be accused of having waived his right to do so. Under such circumstances the SAR in dealing with the defendant's application to set aside the service of the writ should have allowed the defendant's application albeit made orally for a stay of the proceeding to obviate the necessity for him to file a defence pending his appeal to the Judge in chambers. I say so for the simple reason that to refuse the defendant's application for a stay and insisting that he should file his defence would not only render the defendant's purpose of applying to set aside the service of the writ totally useless but also render his pending appeal to the Judge in chambers against the decision of the SAR completely nugatory. Secondly by allowing the defendant's application for a stay the plaintiff will suffer no prejudice at all in that I can see no reason as to why the plaintiff should be so eager to compel the defendant to file his defence bearing in mind that the suit was instituted by the plaintiff only in January 1990 and he knew very well that the defendant was trying to set aside the service of his writ. In the circumstances of the case the only conclusion that I can arrive at is that in objecting against the defendant's application for a stay and insisting that the defendant should file his defence before he could even appeal to the Judge in chambers against the SAR's decision he is in fact trying to prevent the defendant from taking any further steps to set aside the service of the writ when the plaintiff himself was not sure that the service of the writ by AR post is not in effect contrary to law. His uncertainty as regards to the legality of his service of the writ by AR mail is supported by the fact that he did serve the writ a second time in December 1990 by personal service on the defendant. From the facts and circumstances of the present case I am justified to question the *bona fide* of the plaintiff.

When the matter came before me on 25 October 1991, for the reasons as stated above I therefore allowed the defendant to apply orally for a stay and to hear the oral application first in order that justice is done in the present case.

With regard to the allegation of Counsel for the plaintiff that the application of the defendant for a stay made to me was not supported by an affidavit setting out the special circumstances on which he relied to sustain his application to enable the plaintiff to oppose his application, I am of the view that in the present case the plaintiff clearly knew or ought to have known of the special circumstances relied by the defendant namely that if a stay was not allowed it would as stated earlier render the purpose of his applications to set aside the service of

the writ totally useless and more importantly it would be completely futile for him to appeal to the Judge in chambers against the SAR's decision. I say this because any reasonable person stepping in the shoes of the plaintiff would surely have known of the said special circumstances. Again I question the *bona fide* of the plaintiff when his Counsel seemed to suggest that the plaintiff was not aware of the special circumstances relied on by the defendant in support of his application for a stay. In any event in the case of *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] MLJ 116, the applicant for a stay had also failed to file an affidavit in support of his application. Nevertheless Brown J Acting CJ took upon himself to examine the records of the trial to see whether there were any special circumstances to sustain the application for a stay. Thus the learned Acting CJ said at p. 116:

> In the absence of an affidavit I have considered whether any special circumstances which could justify the order for a stay of execution can be found in the record of the trial or in the learned District Judge's grounds of decisions in the action. I can find none.

Finally as to the question of whether the special circumstances relied on by the defendant justify the grant of a stay of the proceedings, an analogy may be drawn from the following passage of the judgment in the case of *Atkins v. The Great Western Railway Co.* [1886] 2 TLR 400:

> The Master of the Rolls said that **he would not undertake to say that the Court of Appeal would never listen to what happened at the trial** in order to see whether they would grant a stay of execution but as a general rule **the only ground for such a stay was an affidavit showing that if the damages and costs were paid there was no reasonable probability of getting them back even if the appeal succeeded.** He would not say that the Court would not interfere for some other reasons but that **those were strong grounds for an appeal was no reason, for no one ought to appeal without strong grounds for doing so.**
>
> (Emphasis supplied)

Two propositions can be distilled from the aforementioned passage of the judgment in the *Atkins* case namely:

(i) that if a successful appellant cannot be restored to his original position then that is a special circumstance for granting a stay of proceeding and

(ii) that the appellant has strong grounds to support his appeal by itself may not necessarily be relevant.

Applying the aforesaid propositions to the present case, there is no doubt whatsoever that if the application for stay is not granted and should the defendant succeed in his appeal against the decision of the SAR the defendant could obtain no restitution for the simple reason that in filing his defence in compliance with the order of the SAR the very purpose of his applications to set aside the writ has become useless and inoperative. Indeed had the defendant failed to enter a conditional appearance that by itself would amount to a waiver on his part to object against the irregularity of the service of the writ on him pursuant to para. (3) of O. 10 r. 1 of the Rules of High Court 1980. For these reasons I am fully convinced that the defendant has sufficiently established to this Court that there are special circumstances to sustain his application for a stay. In any event at the risk of repeating myself, I can see no reason as to why the plaintiff should be so eager to compel the defendant to file his defence by 25 October 1991 bearing in mind that the defendant's appeal against the decision of the SAR is fixed to be heard by the Judge in chambers on 27 January 1992, a delay of about 3 months. As stated earlier the only reasonable conclusion that one can arrive at is that in insisting that the defendant should file his defence before his appeal could

be heard would render the said appeal an exercise of futility. In the result the plaintiff would have got what he wanted at the expense of the defendant regardless of the fact that justice may not be done in the instant case.

I have, therefore, allowed the application of the defendant for a stay with costs in the cause.

Also found at [1992] 1 CLJ 119